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February 13, 2004

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## ***Via Hand Delivery***

Bryant L. VanBrakle, Secretary  
Federal Maritime Commission  
800 North Capitol Street, N.W.  
Room 1076  
Washington, D.C. 20573

Re: **FMC Petition Docket Nos. P1-04 and P2-04; Reply Comments of  
BAX Global Inc.**

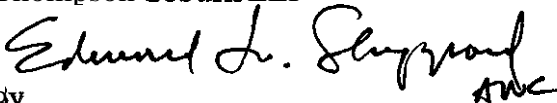
Dear Mr. VanBrakle:

On behalf of our client, BAX Global Inc., we enclose for filing with the Commission an original and 15 copies of Reply Comments to the above-referenced petitions. We also enclose an extra copy of the Reply Comments and ask that it be date-stamped and returned to the undersigned.

Should you need additional information, please do not hesitate to contact the undersigned.

Very truly yours,

Thompson Coburn LLP



BY

Edward J. Sheppard

Enclosures

cc: T. Groff, BAX Global Inc.

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CC:020/030

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**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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**Petitions Nos. P1-04 and P2-04**

\_\_\_\_\_

**CONSOLIDATED REPLY COMMENTS OF BAX GLOBAL INC.  
TO PENDING PETITIONS FOR EXEMPTIONS FROM  
TARIFF PUBLISHING REQUIREMENTS OF SECTION 8 OF  
THE SHIPPING ACT OF 1984, AS AMENDED**

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February 13, 2004

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BEFORE THE  
FEDERAL MARITIME COMMISSION  
WASHINGTON, D.C.

Petitions Nos. **PI-04** and **P2-04**

**CONSOLIDATED REPLY COMMENTS OF BAX GLOBAL INC.  
TO PENDING PETITIONS FOR EXEMPTIONS FROM  
TARIFF PUBLISHING REQUIREMENTS OF SECTION 8 OF  
THE SHIPPING ACT OF 1984, AS AMENDED**

Pursuant to Notices published in the Federal Register on February 3, 2004, 69 Fed. Reg. 5,155 and 5,156, BAX Global Inc. ("**BAX**") submits Consolidated Reply Comments to the following petitions currently pending before the Federal Maritime Commission (the "FMC" or the "Commission"):

- PI-04: Petition of Danzas Corporation d/b/a **Danmar** Lines Ltd.; **Danzas** AEI Ocean Services and DHL-Danzas Air and Ocean (hereinafter referred to as "DHL") for Exemption **from** the Tariff Requirements of Section 8 of the Shipping Act of 1984, as amended; and
- **P2-04**: Petition of BDP International, Inc. (hereinafter referred to as "BDP") for Exemption from the Tariff Publishing Requirements of Section 8 of the Shipping Act of 1984, as amended.

**I. Introduction**

Simply put, BAX believes the **endgame** has arrived, the record is complete, and the Commission must act promptly. Since United Parcel Service, Inc. ("UPS") first tiled its Section 16 request for service contract authority in July 2003, the Commission has: (1) extended the original comment period, (2) reopened the comment period; (3) permitted oral presentations to individual members of the Commission; and, now, (4) received two additional petitions substantially on point with the pending proceedings. It is time for the

Commission to consolidate all related, pending petitions' into a single rulemaking on the issue of service contract authority for qualified non-vessel-operating common carriers ("NVOCCs").

## **II. Reply to DHL and BDP Petitions**

The two latest petitions are not novel in their approach to the issues: DHL and BDP request that the Commission grant a form of contract authority and/or issue an exemption from the tariff publication and adherence requirements of the Shipping Act of 1984 ("Shipping Act"),<sup>2</sup> as amended by the Ocean Shipping Reform Act ("OSRA"). No one should now doubt that these issues are of paramount concern to the shipping industry and public. Moreover, it can no longer be argued that only a handful of NVOCCs seek "special treatment" by the Commission. Accordingly, a single, consolidated rulemaking is the logical means to consider each of the seven pending petitions.

### **A. Petitioners Do Not Present New Issues for Consideration by the FMC.**

While BAX supports the overarching regulatory objectives of both the DHL and BDP petitions, neither request is groundbreaking. DHL and BDP argue respectively what has now become a "traditional" approach to the issue of contract authority and tariff publication and adherence exemptions for NVOCCs: the petitions rely on the Shipping Act's Section 16 authority as the basis for an individual tariff exemption request; DHL

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<sup>1</sup> United Parcel Service, Inc. tiled an petition under Section 16 of the Shipping Act on July 25, 2003, seeking service contract authority (see FMC Dkt. No. **P3-03**); BAX Global Inc. filed a Petition for **Rulemaking** on Sept. 11, 2003, on the issue of NVOCC service contract authority (see FMC Dkt. No. **P8-03**); the National Customs Brokers & Freight Forwarders Ass'n of America tiled a petition on Aug. 8, 2003, requesting that NVOCCs be exempted from the Shipping Act's tariff publication and adherence requirements (see FMC Dkt. No. **P5-03**); Ocean World Lines, Inc. tiled a Petition for **Rulemaking** on Sept. 8, 2003, suggesting that ocean freight forwarder "special contracts" roles be amended to include NVOCCs and NVOCC services (see FMC Dkt. No. P7 -03); and C.H. Robinson Worldwide, Inc. tiled an petition on Sept. 12, 2003, for a Section 16 exemption based on the UPS request (see FMC Dkt. No. **P9-03**).

<sup>2</sup> 46 App. U.S.C. § 1707 *et seq.*; 46 C.F.R. § 520 *et seq.*

and BDP ask for the authority to enter into non-tariff confidential ocean transportation contract agreements as common carriers with their shipper-clients; the international liner shipping industry and public have evolved since passage of OSRA; Congress did not envision the type of sophisticated, financially-stable, and commercially reliable companies operating NVOCCs today (e.g., UPS, FedEx, BAX); and proffer standards that may qualify NVOCCs for tariff exemptions and corresponding contract authority. BAX does not take issue with the substance of either petition and applauds the participation of these fellow members of the NVOCC **community**.<sup>3</sup> In short, what was begun by UPS, furthered by the BAX Petition for Rulemaking, and subsequently endorsed by **FedEx**<sup>4</sup> (and others), has now been embraced by DHL and BDP.

**B. The DHL and BDP Petitions Reinforce the Need to Consolidate the Petitions and Initiate a General Rulemaking.**

On September 11, 2003, BAX filed a Petition for **Rulemaking**<sup>5</sup> on the issue of NVOCC service contract authority, calling on the Commission to consolidate all similarly situated petitions into one proceeding and initiate timely a rulemaking covering these issues. BAX based its initial request in part on the likelihood that other NVOCCs would follow suit with their own requests for service contract authority and/or an

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<sup>3</sup> BAX notes that both the DHL and BDP petitions emphasize an NVOCC's information technology investments and capabilities as part of the overall criteria that the FMC should consider when granting *individual* tariff exemptions. BAX also offered in its Petition for **Rulemaking** a set of criteria for consideration by the FMC. BAX believes that the standards offered by DHL and BDP should be considered as potential qualifications for NVOCC service contract authority **and/or** tariff exemption *only* in the context of a formal **rulemaking**, not as the basis for individual exemptions under Section 16 of the Shipping Act.

<sup>4</sup> FedEx (through its NVOCC subsidiary FedEx Trade Networks & Brokerage, Inc.) submitted comments supporting the BAX Petition for Rulemaking (dated Oct. 10, 2003).

<sup>5</sup> *See supra* note 1

exemption from the Shipping Act's tariff requirements.<sup>6</sup> The DHL and BDP filings validate the soundness of **BAX's** request for a rulemaking. These subsequent filings also, underscore the need-once and for all-to consolidate the pending petitions into one proceeding. This will enable the FMC to manage efficiently the growing number of NVOCC petitions and attend to properly the important regulatory issues raised by all of the petitioners. The continued failure to consolidate the similar filings and initiate a rulemaking will only invite a continual stream of petitions from the NVOCC community.'

The recent petitions continue to highlight the importance of service contract authority and tariff exemptions for NVOCCs and the shipping public.' As stated in its initial Petition for Rulemaking and Supplemental Comments, BAX believes a set of regulations permitting **qualified** NVOCCs to offer confidential service contracts will benefit U.S. shippers and the liner shipping industry as a whole. **BAX's** criteria therefore was offered as a starting point, and without a formal **rulemaking**, the Commission will continue to be confronted with new petitions from the shipping industry (primarily from

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<sup>6</sup> At the time BAX tiled its Petition for Rulemaking, the UPS, National Customs Brokers & Freight Forwarders **Ass'n** of America, and Ocean World Lines, Inc. petitions were already pending before the FMC. Shortly **after** the filing of the BAX petition, C.H. Robinson Worldwide, Inc. tiled an individual Section 16 request based largely on the UPS petition.

<sup>7</sup> We note that the DHL and BDP petitions are remarkably similar in tone, substance, **structure**, and, ultimately, the relief requested. As noted, neither petition is particularly distinguishable **from the five** original petitions requesting the FMC grant service contract authority and/or an exemption from the **Shipping Act's** tariff publication and adherence requirements. Even the comments received to date in the pending petitions (from both supporters and opponents) reargue the same themes and points. Should **future** NVOCCs file service contract or tariff petitions, it is highly likely that those petitioners will also emulate the boilerplates already on the record.

<sup>8</sup> Notably, the National Industrial Transportation League, National Brokers & Freight Forwarders **Ass'n** of America, and the Transportation Intermediary **Ass'n** recently filed Joint Additional Comments stating that the FMC has the authority to grant an exemption providing "greater pricing flexibility and/or reduce regulatory burdens for [NVOCCs]" and asking the FMC to "initiate a **rulemaking** proceeding to determine how to apply its exemption authority. ." See Joint Additional Comments (Jan. 12, 2003) at 1.

the NVOCC sector), each possibly containing additional suggested qualifications, such as those suggested by DHL and BDP. Because of the first five petitions, comments, and reply comments received over the past seven months, BAX maintains that the Commission has a sufficient record enabling it to initiate a rulemaking. Although opponents of NVOCC contracting authority or tariff exemptions may question the petitions' merits, the Commission will not be able to consider adequately or properly their concerns (as well as replies to the concerns) outside of a rulemaking.

BAX notes that even the comments of the World Shipping Council ("WSC") seem to suggest that the Commission should take *some* action on the petitions in the near future to avoid additional petitions from other NVOCCs, ". the parties will likely continue to advocate views so diverse that they will provide scant assistance to the Commission's decision-making process."" In its most recent comments, the WSC specifies issues that, in its opinion, must be explored by the Commission when evaluating the pending petitions." While BAX may not entirely agree with the substance of the WSC's comments, the fact that these questions have been raised demonstrates the need to consider them in a formal context. BAX continues to believe the only proper means of evaluating the petitions and related issues (such as the WSC's questions) is through a rulemaking proceeding. Failure to do so would result in a seemingly endless series of petitions from the NVOCC community and a constant rearguing of the issues-with no end in sight.

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<sup>9</sup> See Further Comments of the World Shipping Council (Jan. 16, 2004) at 7.

<sup>10</sup> *Id.*

### III. Conclusion

BAX believes that it is evident from the comments received in all pending petitions (plus the recent filings by DHL and BDP) that consolidating individual exemption requests in an overall **rulemaking** is the best method for further consideration of all issues raised. Accordingly, BAX maintains that an FMC rulemaking will provide an organized method for consideration of the issues in a single action, rather than through a piecemeal approach requiring individual exemption request by scores of NVOCCs.

Respectfully submitted,

 by AWC

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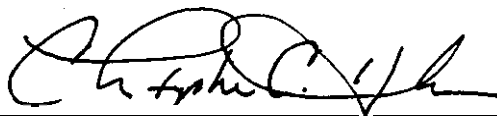
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DATE: February 13, 2004

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Consolidated Reply Comments have been served via e-mail upon the persons or organizations on the following service list, this 13<sup>th</sup> day of February 2004.



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